IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 618

JULIAN W. FRETWELL
Petitioner

v.

PEOPLES SERVICE DRUG STORES, Inc.
Respondent

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner wishes first to express his grateful appreciation to the Court for its prompt action in its approval of the manner of filing this petition.

On October 27, 1941, the Court denied petition for writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit. Petitioner herein presents his petition for rehearing and in support of the petition shows as follows:

DECISION OF FOURTH CIRCUIT IN THIS CASE IN CONFLICT WITH DECISION OF THIS COURT COURT IN ESSEX (PROBAK) CASE

The district court and also the circuit court of appeals in this case both admittedly followed the district court and the circuit court of appeals for the third circuit in the cases of *Fretwell v. Gillette Safety Razor Company*, 6 F. Supp. 818 (Judge Nields), and 78 F (2d) 868 (Judge Buffington), and ignored the decision of this Court in *Essex Razor Blade Corporation v. Gillette Safety Razor Company*, 299 U. S. 94 (Justice Roberts), in which one of the alleged infringing blades was held invalid for want of invention (the Probak blade). But this decision was handed down after certiorari had been denied in *Fretwell v. Gillette Safety Razor Company*, 297 U. S. 704. Petitioner most respectfully requests that this case be reconsidered on that ground, among many others herein set forth. This ground is even stronger than it would be if the decisions of two circuits were in direct conflict, since the decision conflicts with a decision of this Court itself.

II

FAILURE OF DEFENDANT TO DENY THAT PATENT IS PIONEER

Evidence in this case WAS OVERWHELMING TO THE EFFECT THAT THE PATENT IN SUIT WAS A PIONEER INVENTION, BOTH AS TO THE RAZOR AND THE BLADE, but the entire record fails to disclose even a trace of evidence to the effect that the patent was not a pioneer invention, and it is nowhere denied by the defendant that it is a pioneer invention. Nevertheless the defendant proceeded throughout the trial and in all its briefs on the

utterly unjustified assumption that the patent was not a pioneer invention. Therefore, all of the contentions of the defendant fall before a long and unbroken line of decisions of this Court and the lower courts which have been upheld by this Court.

The rule for the interpretation of pioneer patents or patents for pioneer inventions was included in the McCormick case, 69 Fed. 371, decided by the Sixth Circuit, Judge Taft (sometime Chief Justice of this Court) rendering the opinion of the court, in 1895, and followed since that time by all the courts and all the leading authorities on patents in their latest editions, in which Judge Taft held as follows:

> "The rule as to infringement of patents for pioneer inventions, which point the way to new products *or results*, is analogous to that applied in cases involving process patents, in which the discoverer is only required to point out one practicable method of using his process, *and may claim tribute from all who thereafter use the process, whether with his apparatus or with a different or improved means*". (Italics supplied)

In the same opinion Judge Taft goes even farther to hold:

> "The mere use of reference letters in the claims of a combination patent does not of itself, where the invention is really of a primary and pioneer character, *limit the scope of the claims to the exact form shown.* On the contrary, nothing will restrict a pioneer patentee's rights save the use of language in his specifications and claims which permits no other reasonable construction than that he positively intended to limit the scope of his invention to the particular form shown, thus indicating a willingness to abandon to the public any other form."

The undisputedly pioneer patentee in this case entered a disclaimer of any purpose to limit the scope of his claims to the particular form or structure shown in the following language: (See copy of patent, page 338 of Third Circuit

Record, admitted and made a part of the record in this case by the Fourth Circuit Ct.):

> "I have entered into a detailed description of the construction and relative arrangement of the parts embraced in the present and preferred embodiment of my invention in order to impart a full, clear and exact understanding of the said embodiment. I do not desire, however, to be understood as confining myself to the said specific *construction* and relative arrangement of parts inasmuch as in the future practice of the invention *various changes and modifications* may be made such as *fall within the scope of my invention as defined in my appended claims.* (Italics supplied.)

Since Judge Taft's decision in the McCormick case supra it has been customary to insert some similiar provision in patents, but the mere fact that it has become a sort of stock expression sanctioned by precedent does not operate to make it ineffective any more than the expression "to have and to hold", long a stock expression in deeds, renders the language of the deed ineffective, or alters its intent. The use of an expression that has become established through precedent adds to rather than detracts from its legal effect.

In the case of *Diamond Rubber Co. v. Consolidated,* 220 U. S. 428, it was held that a patentee is entitled to *all the benefits, advantages, and uses* to which his invention may be applied, whether he appreciated such advantages and benefits at the date of filing his application or not.

In the case of *Deering v. Winona Harvester Co.,* 155 U. S. 286, it was held that if Howe (inventor of sewing machine needle) had been obliged to make his own method a part of every claim in which the needle was an element his patent would have been practically worthless. This opinion was followed by Judge Buffington and quoted with approval by him in his opinion in *Clarke v. Gillette Safety Razor Co.,*

194 F. 421, and his failure and refusal to follow it and his own previous decision in the case of *Fretwell v. Gillette Safety Razor Company*, 78 Fed. (2d) 868, (with the concurrence of both Judges Davis and Thompson) has caused all the after litigation of the petitioner in this case to be lost, for in all the cases that followed, whether against Gillette or the present respondent, the courts have admittedly followed this manifestly erroneous decision, which was in effect reversed by the U. S. Supreme Court in its decision in the Probak case supra, 299 U. S. 94.

In *Roberts v. Ryer*, 91 U. S. 150, the Court held that a patentee is entitled to all the uses to which the patent might be put whether he conceived the idea or not. This has been followed for many years in patent litigation, a notable example being the case of *Stearns v. Russell*, 85 F 213, by the late Judge Taft, former Chief Justice of this Court.

It has been stated herein that nowhere in the records of this case has it been denied that the petitioner's patent did cover a pioneer invention, and this means that not only has this not been directly denied, but it has not been impliedly denied or impliedly shown by the evidence to be other than a pioneer invention. The nearest approach to any evidence that might be tacitly regarded as offered for that purpose was that of Professor Ballard, admittedly not a patent expert, and admittedly not an expert of any kind, in which he attempted to go into the prior art. He was the only witness for the defense. Against this testimony will be found that of Franklin S. Long (for twenty years, in the United States Patent Office and in the cutlery division of that office, in which razor blades are included, and also a former employee of Gillette Safety Razor Company), who discussed as an outstanding patent expert all the prior art which was discussed by Professor Ballard. The complete testimony of Long as to this will be found in the Third Circuit Record

at pages 303 to 332 of said record, which the Fourth Circuit Court of Appeals admitted as evidence in this case, after same had been excluded by the District Judge (Barksdale)

III

THE COURT BELOW HAS SO FAR DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDING AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The court below has so far departed from the usual and accepted course of judicial proceedings as to call for the exercise of this court's power of supervision by reason of the following:

1. In affirming the findings of fact of the District Court which were not based on the evidence of record in the case. Not only was this true, but the findings of fact in the case were conclusions of law and the so-called conclusions of law were findings of fact, which findings of fact also were not based on the evidence of record. These errors were most earnestly pointed out to the court below for correction, but no comment was even made thereon by the court below in its opinion, although referred to at length both in oral argument and in the brief to the court below, and also notwithstanding that timely objections were made to all such matters.

2. The reasoning of the court below was fallacious on its face, in that it admittedly ruled only on the question of infringement and failed to rule on the objectionable nature of the testimony which was the evidence itself. The court said:

"We believe that the instant decision of the District Court is very clearly supported by the evidence, and, thus, should be affirmed. We, therefore, feel that we need discuss only the *single issue of infringement.* Our decision of that vital issue obviates the necessity of *any consideration* of the many technical points raised by the appellant's brief". (Italics supplied)

It is true that infringement was the main issue in the case, but it does not require a keen logician to see that when infringement is the issue itself any objectionable evidence that is admitted to show non-infringement must be eliminated before a fair judicial opinion of the question of infringement can be had. This the court below failed to do or even rule upon. In other words the court below put the cart before the horse in this case. Instead of ruling on the objections to the evidence, the court assumed that there had been no infringement and admittedly did not consider the other issues at all. Were such reasoning as that permitted it would never be possible to secure justice in any court except by chance. In this case the defense had but one witness, and he was disqualified by his own admission to pass upon the question of infringement. His testimony therefore fell of its own weight on infringement. He answered a hypothetical question to which a valid objection was raised, though overruled by the District Court, and an exception to which was noted. On the answer to this question was based the entire case of the defense for non-infringement. The court below failed to rule on the question of the admissibility of that evidence, though the objection was timely, properly preserved and saved in the case in written form, and properly urged.

3. The court below affirmed the informal decision of the District Court which admittedly was based upon the findings of another court and as to blades of different brand, manufacture, structure, quality, price, construction, material and durability from those in suit. Judge

Barksdale said "I heartily concur with Judge Nields' decision, 6 Fed. Supp. 818." The significance of the word "concur" must not be overlooked in this connection. It implies a closer relationship between the cases than even if the word "agree" had been used. It has a special meaning in a legal sense that implies a merging of one's views in those of another, usually in the same case, but when used with respect to a different case means something more than mere approval. It simply means the complete adoption of the opinion of someone else, which means that in this case the District Court "heartily" concurred in another opinion which had no direct relation to the case at bar, and based his entire decision on this inapplicable case.

4. The court below brushed aside as merely a technical point the question of the admissibility and effect of the testimony of the only witness introduced by the defense in the District Court. The petitioner submits that where only one witness is introduced, and he admittedly having no first hand knowledge of the facts relating to infringement, and also admittedly not a patent expert, by the defense in a suit for infringement of a patent, but having the entire burden upon him nevertheless of refuting the evidence introduced and received without objection on the part of the defense, such question cannot be brushed aside as a merely technical one, as it is the basis of the evidence on the main issue itself.

5. Court below misstated the facts of record in the opinion as follows:

> "frangibility in the blade, apart from transverse flexibility, was an evil sought to be avoided by the appellee in its blade."

The utter fallaciousness of this finding is shown by the fact that the appellee introduced but one witness, a college professor, and not an expert, but who, even if he had qualified as an expert, would not have been able to testify as to the construction of the blades in suit. But the fact that the only witness for the defense did not even try to testify as to this point is conclusive.

This manifestly false statement was decisive of the case, for if the court below had such a clearly erroneous conception of the main issue of the case and the evidence that was the very heart of the main issue of infringement it is evident that the case could not have been fairly considered. But it is easy to understand how the court below fell into this fatal error. The Third Circuit Record had been admitted in evidence. There was an attempt made to show that the defendant in that case sought to avoid frangibility in the blade, but that was a different case with a different defendant, different blades, but all infringing the Weakened Blade Element of Patent No. 1,467,930, as metal beyond the three holes of prior art is shown removed thereby obviously Weakening, and for which no authority can be shown.

6. The decision of the District Court of Delaware (6 F. Supp. 818) was followed by all the courts which have since passed on the Fretwell cases. This opinion may be briefly examined to see what there was in it to be followed by all other courts. The Third Circuit record in that case is in evidence in this case. There are one hundred pages of printed record out of a total of six-hundred pages therein devoted to the question of fraud on the part of the defendant. The question of fraud is passed over without comment in the opinion of the District Judge. No wonder the Court in that case avoided making a separate finding of fact as required by the then new equity rules.

The opinion itself shows the avoidance when it says: "This opinion contains a statement of the essential facts and of the law applicable thereto in conformity with Equity Rule 70½." The rule referred to required separate findings of fact and separate conclusions of law thereon.

But this opinion was so obviously wrong in so many other respects that it is difficult to see how it could have been affirmed even by Judge Buffington, the presiding judge of the Third Circuit which according to undenied press reports on 6/6/38 was reversed in fourteen cases out of fourteen in one term of the Supreme Court.

The District Court also stated in its opinion in the Delaware case that "such breakage as there has been in defendant's blades has always been considered prejudicial and defendant has spent much time and effort to overcome breakage." This goes only to the motive that prompted the defendant and of course has nothing to do with the opposite results achieved at all times, for the plaintiff's disinterested experts pointed out very clearly that the defendant's blades were becoming weaker, more breakable, thinner, and having more metal removed therefrom with every new blade that defendant put on the market. See testimony of Franklin S. Long and Dr. Furman, Dean of Stevens Institute of Technology in Third Circuit Record. In this case it was not a question of what the defendant was *trying* to do as the District Judge seemed to think (except on the fraud issue, and then it did not make any difference apparently), but what it actually *succeeded* in doing. The defendant in that case had no disinterested experts to overcome the testimony of the plaintiff's outstanding experts. The only testimony introduced by the defendant was by its own employees, and even if they had qualified as experts, *which they did not*, this testimony could not have been considered disinterested.

The entire opinion of the District Court in the Delaware case is replete with the same type of illogical reasoning that has no place in any judicial opinion, and above all not in a patent case, which requires clear and unmistakable reasoning. But it must be obvious to anyone with a clear sense of evidentiary values that in order to decide the case as he did the District Judge in the Delaware case was obliged to resort to reasoning that was such a wide departure from the great weight of the evidence as a basis that the entire opinion can be fairly characterized only as having the "baseless fabric of a dream."

CONCLUSION

Petitioner recognizes the fact that this Court has many cases under consideration at all times, and would therefore ask leave of the Court to make a suggestion in the same spirit of great respect and candor in which he has always addressed this Court. In order to save the Court the time and trouble of reading the entire record in the case, it is respectfully urged that if the Court will simply consider the point raised at III (6) of this petition it will find ample ground for rehearing this case without going further into the case, though it is hoped that the Court will find time to read the entire brief and of course see the many other grounds for rehearing, any one of which within itself would be more than sufficient ground for rehearing.

But in order to see the complete departure of the court below from the usual and accepted course of judicial proceeding, which makes the exercise of the Court's power of supervision indispensable to a just decision in this case, it is only necessary to read that part of the opinion of the Court below which says that:

> "In appellee's blade, the large central slot was designed so that the blade could be used on *varying types of ra-*

zors; frangibility in the blade, apart from transverse flexibility, was an evil sought to be avoided by the appellee in its blade." The learned jurist who wrote this opinion was referring to the Segal blade, although this was by no means the only blade in suit, but it must be obvious to anyone without going any farther in this case that when *all* the metal was removed from the centre and a large part of the body of the blade on both sides of the centre that the appellee was not seeking to avoid frangibility in so doing; if so, it was achieving the opposite effect from that sought, and results in that case are determinative rather than designs. If someone could invent a plan by which the laws of physics could be so far defied as to render blades *less* breakable in the removal of *more* metal therefrom, such invention would be fabulously profitable, but I do not understand that any such claims have yet been made for any patent. Certainly not by the "appellee", Segal, since the Segal Patent makes no claims at all for the blade, all of the claims of the Segal Patent relating to the razor.

Moreover, there was not a trace of evidence in the record to support the finding that "frangibility was an evil sought to be avoided by the appellee in its blade." Not even the District Court made any such finding in this case. Judge Nields admitted some evidence in the Delaware case to that effect respecting the Gillette blade and the Probak blade, but that could have no relation to a blade utterly different in structure, design, and price as the Segal blade and more especially in the complete absence of evidence to that effect. Judge Barksdale affected to see some relation because the plaintiff referred to the infringing blades as being of the Gillette type. Plaintiff explained in his Bill of Particulars exactly what was meant by that general term, which was used to cover all thin wafer-like blades having the element of transverse flexibility. That broad definition of "Gillette type" blade would also include the Segal blade, but the District Court did not take the trouble to refer to the Bill of Particulars in that connection as it was trying to complete and decide the entire case in one day and succeeded in doing so, over the protest of the plain-

tiff, who wished to have the case more carefully considered from every point of view, and be allowed to submit a brief before any decision was made.
In the case of *Gillette Safety Razor Company v. Cliff Weil Cigar Co.*, 107 F 2d 105, the Court referred to the Segal razor as a Gillette type of razor, but found no infringement although it was the Segal razor that was being sued upon. Of course that suit did not concern the Segal blade as the Segal Patent on Razor and Blade No. 1,865,971 was not applied for until May 26, 1930, and patent was not granted until July 5, 1932, both of which dates post-dated the expiration of the Gillette Patent by several years, and no suit could have been maintained by Gillette after the Gillette blade had entered the public domain. It is not unusual to refer to all blades of such thinness as to require external support to maintain rigidity for shaving as Gillette type of blades, and so the learned District Judge who saw some relationship between the Segal and the Gillette blade because the plaintiff referred to the Segal blades as being of the Gillette type was evidently unaware of this custom wherein all blades are so called.

In this connection is it significant that although the defense made the following statement before introducing any evidence,

> "Mr. Kane: The defendant wishes to state on the record, at the opening of its case, that the defense of this action is undertaken by the Segal Safety Razor Corporation and the Segal Lock and Hardware Company, Inc. for the defendant, Peoples Service Drug Stores, Inc."

that none of the Segal Patents was at any time introduced in evidence. It would have seemed desirable that since Segal was avowedly defending the case on account of its blades being involved that at least one of the four Segal Patents numbered 1,816,657, 1,816,658, 1,816,659, and 1,865,971, be introduced in evidence in order to show non-infringement. The answer is obvious. They were all invalid in view of the Fretwell Patent No. 1,467,930, which

antedated them all by more than five years, and especially any part of them which might have been held to relate to a blade, and Patent No. 1,865,971 was granted for a "razor and blade" although no separate claim was made for a patent on the blade to Segal. Plaintiff introduced the Segal blade as one of the infringing blades.

The Court below went so far as to quote from the opinion of Judge Buffington in his decision upholding Judge Nields in the Third Circuit case against Gillette Safety Razor Company, and stated that Judge Buffington's conclusions are particularly applicable. No coment need be made upon this except to say that Judge Buffington in that case (78 F 2d 868) followed precisely the same method of reasoning as to the Gillette type of blades that led to his unanimous reversal by the Supreme Court of the United States six months later, as to which see 299 U. S. 94, reversing 83 F 2nd 571, hereinabove commented upon at length.

If any further comment were necessary on the opinion of Judge Buffington in that case, it might be added that Judge Buffington therein made the following statement "The opinion of the court below is so exhaustive as to leave nothing to be said by this court except by way of repetition." In view of the fact that there were more than one hundred printed pages of the record in that case (See Third Circuit Record) supra relating exclusively to the issue of fraud and that no mention of that issue was made by Judge Nields in his entire opinion it could scarcely be considered "exhaustive." This was the case in which Judge Nields avoided making any separate findings of fact and conclusions of law thereon as required by the then new Equity Rules.

Since the court below has so far departed from the usual and accepted course of judicial proceedings and further

so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision in so many respects, any one of which would be sufficient as a basis for the granting of the writ of certiorari originally applied for, this Court is most respectfully requested to rehear and reconsider this most meritorious case, wherein the interest of the public at large is so clearly at stake.

Respectfully submitted,

JULIAN W. FRETWELL, *Pro Se*

This petition is submitted in good faith and not for purposes of delay.

JULIAN W. FRETWELL

Jan. 20, 1942

In the Canadian Law Reports is found most well argued and reasoned Decisions on this Gaisman or Probak Patent, but Nullified by the Exchequer Court in 1932, Page 132 back of Part VI-June 30th. 1932 and the Supreme Court of Canada, on page 142. *Gillette Etc. v. Pal Blade Corp*, in Part II of Feby 28th. 1933. Excerpt from the latter Court, quote from Page 152:

"If one suppressed all the parts of the elongated slot thus being functionless, the blade would remain with the central hole, (which has nothing to do with shaving relation), and two diamond shaped apertures spaced from the central hole: all together three openings".

"—but it will also fit the bar type razor, the Goodwill razor and other holders, acording to the evidence".

Eleven pages of good patent reasoning, which would love for this Court read, as it no doubt has these Reports.

In Collier's Weekly of September 13th, 1941, and on Page 11 will be seen our President Mr. Roosevelt, says: The Fight Goes On and "The Constitution Prevails".